OTTAVIO QUATTROCCHI

v.

MENTERI DALAM NEGERI, MALAYSIA & ORS (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[APPLICATION ORIGINATING SUMMONS NO: R1-25-10-2001]
17 OCTOBER 2002

CIVIL PROCEDURE: *Judgments and orders - Alterations - Extradition proceedings - Stay order - Whether did not bar application for release of applicant's passport - Whether to be varied accordingly - Extradition Act 1992, ss. 3, 12, 13 - Rules of High Court 1980, O. 53*

The Union of India, the fourth respondent, had made a requisition to the Minister of Home Affairs ('the Minister') to extradite the applicant to India as a fugitive criminal. Following that the Minister issued a special direction and an order pursuant to ss. 3 and 12(3) of the Extradition Act 1992 ('the Act'), and the learned magistrate, henceforth, issued a warrant of apprehension pursuant to s. 13(1) of the Act. In the ensuing extradition proceedings before the Sessions Court the applicant furnished the bail sum set by the court, and in compliance with the bail term thereof, surrendered his international passport. In the subsequent application for *certiorari* to quash the respective decisions of the Minister and Magistrate, the applicant obtained a stay of the extradition proceedings, whenceforth, on 8 March 2001 Vohrah J ordered that "the implementation of decisions such as those under challenge in these proceedings be stayed pending the final resolution of that challenge" ('the stay order'). In December 2001, the applicant needed his passport for his travel requirements, and in the circumstances applied to the Sessions Court for the release of the same. The Sessions Court however took the view that the stay order had stayed all proceedings, including that of the applicant's application for the release of his passport, and hence dismissed the application.

Dissatisfied, the applicant applied to vary the terms of the stay order, effectively to add thereto words which would exclude from the scope of the order any application by him for the release of his passport. It was the applicant's contention that the variation was necessary in order 'to give effect to the true intent' of Vohrah J's order.

Held:

[1] What the applicant meant by 'true intent of the stay order' in his affidavit was not the true intent to be determined from the words of the stay order, but the true intent in the mind of Vohrah J when he made the stay order, that is to say, no matter what some people might understand the words actually used in the stay order, which would be a question of interpretation for the appeal, Vohrah J could not have intended, in deciding to make the stay order, that the applicant should be debarred from making an application regarding bail or passport, which would be a question of policy. (pp 722 h & 723 a)

[2] The application here would not become academic as a decision in the applicant's favour would serve his future travel needs. Likewise, the court herein was also not *functus officio*. A court would only become *functus officio* if it has made a final pronouncement on the rights of the parties appearing before it. In this case, the stay order was not a final pronouncement on the rights of the applicant and the respondents in the judicial review proceedings but was a mere direction that the status quo be maintained pending judicial review of the acts of the Minister and the Magistrate. It is also trite that 'apart from the slip rule, the court has an inherent power to vary its own orders as to bring it into harmony with the order it obviously meant to pronounce'. (pp 723 d, e, g & 724 c, d)

[3] The stay order made pursuant to O. 53 r. 3(5) Rules of the High Court 1980 here is meant for the benefit or protection of the applicant for leave. It cannot therefore be said that in granting the stay, Vohrah J had intended that the applicant should be barred from making an application as regards his bail or passport. Hence, the variation sought ought to be allowed. (p 724 f)

[Order accordingly.]

Case(s) referred to:

Datuk Hussain Mohamed v. First Malaysia Finance Bhd & Anor [1990] 1 CLJ 258; [1990] 1 CLJ (Rep) 802 ***(foll)***

Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd [1990] 2 CLJ 1044; [1990] 2 CLJ (Rep) 125 ***(foll)***

Legislation referred to:

Extradition Act 1992, ss. 3, 12(3), 13(1)(a), 19

Rules of the High Court 1980, O. 53 r. 3(5)

For the applicant - Muhammad Shafee Abdullah (Rabinder Singh & Raymond TC Low); M/s Shafee & Co

For the 1st, 2nd & 3rd respondents - Kamarul Hisham (Azman Ahmad & Azmin Shah)

For the 4th respondent - Cyrus Das (Steven Thiruneelakandan & T Sudharsanan); M/s Shook Lin & Bok

Reported by WA Sharif

JUDGMENT

Abdul Aziz Mohamad J:

On a requisition by the Union of India, the fourth respondent, for the extradition of the applicant to India as a fugitive criminal, the Minister of Home Affairs gave a special direction under s. 3 of the Extradition Act 1992 that the Act shall apply to India in relation to the extradition thereto of the applicant, and also made an order under s. 12(3) authorising the magistrate to issue a warrant for the apprehension of the applicant, which the magistrate accordingly did under s. 13(1)(a). The applicant was duly apprehended on 20 December 2000 and brought before the Sessions Court to face extradition proceedings under s. 19. The Sessions Court granted the applicant bail in the sum of RM400,000 with two sureties on condition that his international passport, which is of Italian origin, be surrendered. Bail was furnished and the passport was surrendered to the Sessions Court.

During the pendency of the extradition proceedings in the Sessions Court, the applicant sought by an application filed on 19 January 2001, and obtained on 8 March 2001, leave under O. 53 r. 3 of the Rules of the High Court 1980 to apply for *certiorari* to quash the special direction and the order of the Minister and the warrant of apprehension.

One of the reliefs sought in the leave application was worded as follows:

> all proceedings against the Applicant abovenamed in the matter of Kuala Lumpur Sessions Court Case No. 3-64-61-2000 be stayed pending the hearing and final determination of these proceedings for leave and substantive relief thereto.

As the prayer was worded, the stay sought was of the extradition proceedings in the Sessions Court. The stay order that Vohrah J (as he then was) actually made on 8 March 2001 was in the following terms:

> the implementation of decisions such as those under challenge in these proceedings be stayed pending the final resolution of that challenge.

The stay ordered was therefore of the implementation of decisions "such as those" under challenge in the judicial review proceedings. The decisions under challenge were the decisions of the Minister and of the Magistrate to make or issue the special direction, the order and the warrant earlier mentioned.

These grounds are the grounds of my decision to allow the applicant's application to vary the stay order.

I am unable to say at whose instance was the stay order worded differently from the wording in the leave application – whether at the applicant's or Vohrah J's – because there was no evidence before me as to that. I am saying this because learned counsel for the Union of India in submission suggested – or may have suggested – that the wording of the order was as sought by the applicant.

The applicant's application for variation of the stay order came about as follows.

On 3 December 2001, one year after the applicant surrendered his passport, the applicant applied to the Sessions Court for an order, *inter alia*, for the release of the passport to enable him to travel overseas in connection with his business. On 26 February 2002, upholding a preliminary objection raised by the senior federal counsel, counsel for the first to the third respondents, the Sessions Court dismissed the passport application. In para. 10 of his affidavit in support of his application to vary the stay order, the applicant said:

> The learned Sessions Court Judge ruled that one reason for the said application to be dismissed was that the Leave Order stayed all proceedings including the application for my passport to be released from the Sessions Court at Kuala Lumpur.

On 6 March 2002 the applicant lodged an appeal against the decision of the Sessions Court Judge. In the appeal, the question would be one of interpretation as to the effect of the actual words used in the stay order. I expect that the crucial words will be "such as those".

On 15 May 2002 the applicant filed the application for variation. The variation was to add certain words to the stay order whose effect would be to clearly exclude from the scope of the stay any application by the applicant for a variation of the conditions of bail or for the release of his passport.

In para. 13 of his said affidavit, the applicant said that the variation of the stay order was "to give effect to its true intent". To my understanding, what the applicant meant in that paragraph by the true intent of the stay order was not the true intent to be determined from the words of the stay order but the

true intent in the mind of Vohrah J when he made the stay order, so that my understanding of the applicant's position was that no matter how some people might understand the words actually used in the stay order, which would be a question of interpretation for the appeal, Vohrah J could not have intended, in deciding to make the stay order, that the applicant should be debarred from making an application regarding bail or passport, which would be a question of policy.

Learned counsel for the Union of India submitted that should the applicant succeed in the appeal, the application before me would become academic and that I should decline to make a ruling on an academic question. He said that the applicant should seek a variation only after the appeal is decided, if it is decided against him, so as to avoid multiplicity of proceedings which would involve a risk of two conflicting decisions being made.

I was of the view that the application before me was or would not become academic. I was informed by learned counsel for the applicant that a decision in his favour on the application – as also a decision in his favour on the appeal – would serve a future need as the applicant might need to travel abroad on business on other future occasions. I was also informed that as at the date of hearing of the application, 26 July 2002, the grounds of decision of the Sessions Court Judge had still not been written. So the applicant's appeal might not be decided in the near future. In the circumstances, it was the applicant's appeal that might become academic, if his application before me was decided in his favour, and not the other way round. As to conflicting decisions, there would also be a risk of it if, as contended by counsel for the Union of India, the applicant were to seek the variation only after failing in the appeal. In any case, there would be no conflict of decisions in the real sense since the decision on the appeal would be one of interpretation and that on the application would be one as to policy. The important consideration was whether an avenue for applying for variation was open to the applicant. If it was, he ought not to be denied recourse to it, notwithstanding the appeal.

It was submitted for the Union of India that no avenue for variation was open to the applicant because after the making of the variation order the court was *functus officio*. I was of the opinion that the court was not *functus officio*. I relied on the following passage from *Datuk Hussain bin Mohamed v. First Malaysia Finance Bhd & Anor* [1990] 1 CLJ 258; [1990] 1 CLJ (Rep) 802 at p. 260 (p. 805), which was cited by the applicant's counsel:

> At this stage, it is pertinent to ask when does a court become *functus officio*? A court becomes *functus officio* when it has already made a final pronouncement on the rights of the parties appearing before it. This must however be distinguished from orders which are in the nature of directions as to how the future proceedings on the cause of action that is before the court are to be conducted. These orders, which are in the nature of directions, can be varied by the same court that granted the original order as the court is not *functus officio*. It only becomes *functus officio* once the rights of the parties have been determined as the effect of each proceedings is to bring all proceedings to an end.

The stay order was not a final pronouncement on the rights of the applicant and the respondents in the judicial review proceedings. It was in the nature of a direction that the *status quo* be maintained pending judicial review of the acts of the Minister and the Magistrate. I also relied on *Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd* [1990] 2 CLJ 1044; ([1990] 2 CLJ (Rep) 125), where it was said at p. 1048 (p. 130): "Apart from the slip rule, the court has an inherent power to vary its own orders so as to bring it into harmony with the order which it obviously meant to pronounce".

The stay order was granted pursuant to O. 53 r. 3(5), which provides as follows:

> The grant of leave under this rule shall not, unless a Judge so directs, operate as a stay of the proceedings in question.

It is obvious that a stay under the rule is meant for the benefit or protection of the applicant for leave. I simply could not think that in granting the stay Vohrah J had intended that the applicant should be barred from making an application as regards his bail or passport. It would be contrary to the purpose of a stay order under the rule. If the question had been posed to Vohrah J whether the applicant should be prevented from making such an application, the answer would have been a strong no. The applicant himself would not have sought such a result. And if it could be foreseen that the words of the stay order as they stood would or could be construed so as to produce such a result, then express words would undoubtedly have been inserted, such as those now proposed, to prevent any possibility of such a construction.

That was my reason for allowing the variation. As I hope I have shown, it does not involve a construction on my part of the words of the stay order, which will be a matter for the appeal.